HWG | HARRIS, WILTSHIRE & GRANNIS LLP

1919 M STREET NW
SUITE 800
WASHINGTON DC 20036

TEL +1 202 730 1300
FAX +1 202 730 1301
HWGLAW.COM

ATTORNEYS AT LAW

March 4, 2019

Marlene H. Dortch, Secretary
Federal Communications Commission
445 12th St. SW
Washington, DC 20445

Re: *Connect America Fund, Developing a Unified Intercarrier Compensation Regime*, WC Docket No. 10-90 & CC Docket No. 01-92

Dear Ms. Dortch,

CenturyLink submits this ex parte in response to recent filings by Verizon[1] and in further support of CenturyLink's petition for a declaratory ruling that over-the-top VoIP providers and their LEC partners perform the functional equivalent of end office switching, and, accordingly, may tariff and collect end office local switching access reciprocal compensation under the Commission's rules.

As an initial matter, Verizon claims that allowing LECs to bill their tariffed end office switching charges for over-the-top VoIP calls facilitates "robocall-driven 8YY arbitrage schemes."[2] Verizon does not explain why it believes that over-the-top traffic, as opposed to other forms of traffic, is particularly to blame for robocall-driven arbitrage schemes. But in any event, the Commission already has open proceedings on 8YY and other forms of arbitrage and it can and should address arbitrage issues there.[3] Moreover, this proceeding is about the charges appropriate for over-the-top traffic generally, which includes not just originating access charges charged today but terminating access charges going back years. The Commission's goal in adopting its VoIP-PSTN framework was to eliminate disputes with a simple, straightforward rule and to ensure that providers using VoIP technology were not at a disadvantage when competing against older, traditional services.[4] Even if denying the CenturyLink petition might have some marginal impact on 8YY arbitrage, to permit Verizon's present-day policy concerns about a

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1 *See* Letter from Curtis L. Groves, Verizon, to Marlene H. Dortch, FCC, WC Docket No. 10-90, et al. (filed Dec. 19, 2018) ("*Verizon Dec. 19, 2018 ex parte"*); Letter from Alan Buzzacott, Verizon, to Marlene H. Dortch, FCC, WC Docket No. 10-90, et al. (filed Feb. 7, 2019) ("*Verizon Feb. 7, 2019 ex parte"*).

2 *Verizon Feb. 7, 2019 ex parte* at 1-2.

3 WC Docket Nos. 18-155, 18-156.

4 *See, e.g.*, *Connect America Fund*, *et al*., Report and Order and Further Notice of Proposed Rulemaking, 26 FCC Rcd. 17,663 ¶¶ 937-39, 953 (2011) (*USF/ICC Transformation Order*).

fraction of the traffic covered by the VoIP-PSTN framework to override the policy objectives the Commission declared when it adopted that framework many years ago would be unjustifiable.

With respect to the VoIP Symmetry Rule itself, Verizon asserts there is a "bright line" rule that a LEC-VoIP provider partnership must interconnect with "last mile" facilities to the VoIP provider's customer to be eligible to impose end office switching charges.[5] Verizon also asserts that the Commission adopted the VoIP Symmetry Rule solely "to resolve disputes that arose when *fixed* VoIP retail providers, like cable companies, partnered with wholesale carrier LECs."[6] This letter explains that (1) Verizon's purported bright line rule is not the law: (A) it would lead to bizarre, unjustifiable results if it were the law, and no carrier, including Verizon, appears to believe that it is the law, and (B) the precedents on which Verizon relies do not support its purported rule; (2) Verizon's narrow view of the purpose of the VoIP Symmetry Rule cannot be reconciled with the order adopting the rule or the notice of proposed rulemaking that led to it, which specifically considered adopting different rules for fixed and nomadic VoIP and then did not do so, despite AT&T's urging; and (3) a straightforward application of the law demonstrates that LECs are entitled to charge end office access charges for over-the-top VoIP calls, and while the Commission is free to consider changing the law, it can only do so on a going-forward basis consistent with the requirements of the Administrative Procedure Act.

1. Verizon's Proposed "Bright Line" Rule Is Not the Law, And Would Harm the Development of Innovative Services.

A. Verizon's Rule Would Produce Unjustifiable Results and No Carrier Treats Over-the-Top VoIP Traffic as Verizon's Rule Would Require.

The Commission has never adopted Verizon's proposed "bright line" rule, and for good reason. If it did, it would lead to unjustifiable and unworkable distinctions between traffic subject to different access charges. This is what the *USF/ICC Transformation Order* generally and the VoIP Symmetry Rule sought to avoid. To be very clear, Verizon's framework would create these unworkable distinctions for *all* VoIP calls—not just retail residential VoIP, which might be fixed or over-the-top for a given end user, but also enterprise VoIP, which might be considered fixed for some calls and over-the-top for others, even for the same end user over the exact same physical facilities. These innovative unified communications services are offered by every major provider, because enterprise customers demand this flexibility, and no LEC—including Verizon—actually believes that Verizon's purported bright line rule is the law or makes any effort to follow that purported rule in practice.

Verizon asserts that there is "nothing arbitrary" about its proposed rule,[7] but an examination of how that rule would apply to modern enterprise services, such as Verizon's own

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[5] *See Verizon Feb. 7, 2019 ex parte* at 2.

[6] *Verizon Dec. 19, 2019 ex parte* at 2 (emphasis in original); *see also Verizon Feb. 7, 2019 ex parte* at 3.

[7] *Verizon Feb. 7, 2019 ex parte* at 2.

Virtual Communications Express[8] or any number of other popular hosted enterprise services, such as Microsoft's Skype for Business, demonstrates otherwise.

Verizon acknowledges that a LEC may impose end office access charges if the enterprise is connected to the VoIP server over a connection purchased from the LEC or the VoIP provider.[9] But it asserts that the LEC may not if the enterprise has "brought its own" bandwidth purchased from another provider.[10] That means that if the enterprise is connected to the data center hosting the VoIP server over a business data service connection owned by, for example, the local cable company, then end office access charges *are* available if the LEC or the VoIP provider has leased that connection from the cable company,[11] but not if the enterprise has purchased the business data connection itself.[12] The same appears to be true about an Internet connection: if the enterprise connects to the VoIP server over an Internet connection sold by the LEC or VoIP provider,[13] end office access charges would be appropriate, even if the LEC or VoIP provider is simply reselling the local cable company's service, but end office charges are not available if the enterprise purchased Internet service directly from the same underlying cable provider. What is more, in situations where the enterprise has *not* brought its own bandwidth, Verizon's framework would provide that end office access charges are available if a remote employee has connected to the enterprise's VPN over an Internet connection;[14] on the other hand, they would not be applicable if the employee connects to the hosted VoIP server without

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8 *See* Virtual Communications Express, Verizon, https://www.verizon.com/business/products/virtual-communications-express/ (last visited Mar. 1, 2019) ("Verizon VCE Enterprise Webpage").

9 *See Verizon Feb. 7, 2019 ex parte* at 1-3 (agreeing that end office access charges are permissible in cases where the LEC or the VoIP provider provides the last mile connectivity to the enterprise customer).

10 *See Verizon Feb. 7, 2019 ex parte* at 3. It bears noting that Verizon is incorrect in describing Figures 2-5 of CenturyLink's Nov. 28, 2018 *ex parte* as situations involving an enterprise bringing its own bandwidth. *See Verizon Feb. 7, 2019 ex parte* at 3 & n.15. *But see* Letter from John T. Nakahata and Kristine Laudadio Devine, CenturyLink, to Marlene H. Dortch, FCC, WC Docket No. 10-90, et al., at 4, Figures 2-5 (filed Nov. 28, 2018) ("*CenturyLink Nov. 28, 2018 ex parte*") (describing, in Figures 2-4, situations where the enterprise has purchased connectivity from the LEC, and in Figure 5, a situation where an employee working from home connects to the VoIP service over an Internet connection purchased from the LEC).

11 *See CenturyLink Nov. 28, 2018 ex parte* at 4, Figure 2 (depicting this arrangement).

12 This arrangement is not depicted in CenturyLink's Nov. 28, 2018 *ex parte*, but it is identical to figure 2 except that the term "resold Ethernet VPL" would be replaced by "Ethernet VPL purchased directly from underlying provider."

13 *See CenturyLink Nov. 28, 2018 ex parte* at 4, Figure 4 (depicting this arrangement).

14 *See Verizon Feb. 7, 2019 ex parte* at 3 (In an old-fashioned PBX arrangement where remote locations were connected over non-LEC facilities, "all external calls handled by the PBX system traveled over the last mile facility connecting the PBX to the LEC providing service to the customer. Therefore, insofar as that LEC was billing switched access charges to a long-distance carrier for those calls, it was billing for the work it was performing."). If the employee has connected to the enterprise's VoIP server over a VPN, the call will travel between the hosted VoIP server and the enterprise's VPN server, similar to the routing in an old-fashioned PBX arrangement.

logging in to the VPN first.[15] It is difficult to conceive of any policy basis for having intercarrier compensation depend on the happenstance of, for example, which company sends the bill to the enterprise for the same underlying connectivity to the VoIP server, much less whether a remote employee sitting in a coffeeshop has keyed in a VPN code. In any event, the Commission has never identified a basis for having intercarrier compensation depend on any such circumstances—and the VoIP symmetry rule and the *USF/ICC Transformation Order* more generally sought to move away from such distinctions.

There is also no evidence that any carrier, including Verizon, actually believes that Verizon's proposed rule is the law or makes any effort to follow that purported bright line rule in practice. Verizon has never denied that it has charged end office access charges on calls delivered to and from its enterprise customers without regard to whether any of those customers have "brought their own bandwidth"—a feature that Verizon emphasizes in its marketing.[16] Nor has Verizon denied that it has always charged end office access charges without regard to whether its enterprise customers' employees were connected via a VPN or directly to the VoIP server when they placed or received a call. In fact, CenturyLink is not aware of a single carrier that bills access charges in a manner consistent with the framework Verizon suggests.

B. FCC Precedent Provides No Support for Verizon's Interpretation of the VoIP Symmetry Rule.

Setting aside the incoherence and arbitrariness of Verizon's proposed framework, and the fact that no carrier, including Verizon, appears to apply that framework, Verizon's bright line rule that a LEC-VoIP provider partnership must interconnect with last mile facilities to the VoIP provider's customer[17] is not the law.

In support of its purported bright line rule, Verizon relies on the dissenting statements from Commissioners Pai and O'Rielly in the *VoIP Symmetry Declaratory Ruling*.[18] As an initial matter, the Commission has not issued an order that adopts Verizon's bright line rule or the logic set forth in the Pai and O'Rielly dissents. Further, neither dissent provides the basis of a decision in Verizon's favor in this proceeding.

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[15] *See id*. (asserting that, in various scenarios where the last-mile connection is purchased separately either by an enterprise or by a residential customer, the LEC and its VoIP partner are not performing the functional equivalent of end office switching). If the employee does not connect to the enterprise's VoIP server via the VPN but instead connects directly, the enterprise's direct, purchased connection to the VoIP server is not part of the call flow, and, therefore, under Verizon's theory, no end office charges would apply.

[16] *See* Verizon VCE Webpage ("Bring your own broadband provider Virtual Communications Express can run over virtually any internet connection, so you can keep your current internet service provider.")

[17] *See Verizon Feb. 7, 2019 ex parte* at 2.

[18] *Connect America Fund*, Declaratory Ruling, 30 FCC Rcd. 1587 (2015) ("*VoIP Symmetry Declaratory Ruling*"), *vacated by AT&T v. FCC*, 841 F.3d 1047 (D.C. Cir. 2016).

Commissioner Pai's dissent was predicated on the argument that in the *Declaratory Ruling*, the Commission contravened precedent that made clear that the functional equivalent of end office switching is the "interconnection of calls with last-mile facilities."[19] The dissent relied on three Commission precedents, none of which support that conclusion.

First, the Pai dissent quoted the *RAO 21 Reconsideration Order*, which explained that "'interconnection, i.e., the actual connection of lines and trunks, is the characteristic that distinguishes switches from other central office equipment.'"[20] The Pai dissent acknowledged that the RAO Letter under reconsideration in that order had identified a total of eight basic switching functions, but asserted that the Commission had concluded that all functions beyond interconnection were "peripheral" because "units that interconnect lines and trunks . . . are capable of performing all of the essential features and capabilities of a switch."[21]

As CenturyLink has previously explained, the *RAO 21 Reconsideration Order* supports CenturyLink's view that connecting to last-mile facilities is not required for a LEC-VoIP partnership to perform the functional equivalent of end office switching.[22] The Commission in the *RAO 21 Reconsideration Order* set forth a test to distinguish switches from certain non-switches (specifically, remote terminals of concentrators), even in circumstances when the non-switch equipment could perform some basic functions generally performed by switches.[23] But nothing in the order purports to distinguish one category of switches (end office switches) from another (tandem switches). And the Commission's use of the phrase "connection of lines and trunks" was not a reference to *end office* switching at all. Rather, that phrasing was the way the Commission described *all* switches, including tandem switches, in the *RAO 21 Reconsideration Order* itself, when it used that phrase in describing equipment that would be assigned to expense accounts that included all switches,[24] and in other contemporaneous publications, which also used this language to include tandem switches.[25]

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[19] *See VoIP Symmetry Declaratory Ruling*, 30 FCC Rcd. at 1615, Dissenting Statement of Commissioner Ajit Pai ("*Pai VoIP Dissent*").

[20] *See Pai VoIP Dissent*, 30 FCC Rcd. at 1616 (quoting *Petitions for Reconsideration and Applications for Review of RAO 21*, Order on Reconsideration, 12 FCC Rcd. 10,061, 10,067 ¶ 11 (1997) ("*RAO 21 Reconsideration Order*")).

[21] *Id*. (*citing Classification of Remote Central Office Equipment*, Letter, Responsible Accounting Officer, 7 FCC Rcd. 5205, 5205, n.1 (1992) ("*RAO Letter 21*"), *revised by Classification of Remote Central Office Equipment*, Letter, Responsible Accounting Officer, 7 FCC Rcd. 6075, 6075, n.1 (1992) (*Revised RAO Letter 21*); *and quoting RAO 21 Reconsideration Order*, 12 FCC Rcd. at 10,067 ¶ 12).

[22] *See* Reply Comments of CenturyLink in Support of Its Petition for a Declaratory Ruling at 9-11, 13-14, WC Docket No. 10-90, et al. (filed July 3, 2018) ("*CenturyLink Reply Comments*").

[23] *RAO 21 Reconsideration Order*, 12 FCC Rcd. at 10,666-10,067 ¶ 11.

[24] *See* 47 C.F.R. §§ 32.2211, 32.2212.

[25] *See Revision of ARMIS USOA Report (FCC Report 43-02) for Tier 1 Telephone Companies*, Order Inviting Comments, 6 FCC Rcd. 5434, 5467, tbl. X (1991) (emphasis added); *see also Policy and Rules Concerning Rates for Dominant Carriers*, Memorandum Opinion and Order, 6 FCC Rcd. 2974, 3048, Row Instructions Table IV (1991) (defining "switching entities" as "assemblies of equipment

What the Commission held in the *RAO 21 Reconsideration Order* was not that end office switching involved a connection to a last-mile facility, but rather that what distinguished switches from non-switches was their ability to perform the specific basic function identified of interconnection—the connection of lines and trunks. The Commission was unambiguous about what that phrase meant. The Commission explained that a device would be a switch if it "is capable of interconnecting lines and trunks, *i.e.*, if it has the switching matrix required for call interconnection"[26] affirming that this was the same thing as possessing the capability to redirect the actual voice path.[27] In other words, what distinguished any switch from a non-switch was its ability to form interconnections among particular lines and/or particular trunks to establish a particular routing for a voice call. The distinction the Commission relied upon has nothing to do with last-mile facilities; it is about the interconnection of particular routes to complete a call, which is what a switching matrix (and thus a switch) does.

AT&T has suggested that the ISP in an over-the-top call performs the functional equivalent of end office switching,[28] but the holding of the *RAO 21 Reconsideration Order* precludes such a result. The ISP, just like the remote terminal of a concentrator in the *RAO 21 Reconsideration Order*, does not have the capability to route the voice call to its destination, but instead can only pass the call to the LEC-VoIP provider partnership, who do, in fact, perform that switching function. In fact, the ISP does not have the capability to perform *any* of the other basic functions of a switch referred to in the Pai dissent or Revised RAO Letter 21; but the Commission affirmed in the *RAO 21 Reconsideration Order* that switches were capable of performing *all* of those functions, even if some non-switch remote equipment might also be able to perform a subset of those functions.[29]

Second, the Pai dissent quoted a portion of paragraph 969 from the *USF/ICC Transformation Order*, reproduced in its entirety here:

> Our transitional VoIP-PSTN intercarrier compensation rules focus specifically on whether the exchange of traffic occurs in TDM format (and not in IP format), without specifying the technology used to perform the functions subject to the associated intercarrier compensation charges. We thus adopt rules making clear

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designed to establish connections between lines and trunks. Switching entities include access tandems, local, class 5 switching machines and any associated remotes."); *Statistics of Communications Common Carriers*, FCC, 2004/2005 Edition at 22 (2005), https://docs.fcc.gov/public/attachments/DOC-262086A1.pdf ("Central office switches are assemblies of equipment and software designed to establish connections among lines and between lines and trunks, including access tandems, local, class 5 switching machines and associated remote switching machines."

[26] *RAO 21 Reconsideration Order*, 12 FCC Rcd. at 10,067 ¶ 11.

[27] *See id*.

[28] *See* Comments of AT&T on CenturyLink Petition for Declaratory Ruling, WC Docket No. 10-90, et al. at 18-19 (filed June 18, 2018).

[29] *See RAO 21 Reconsideration Order*, 12 FCC Rcd. at 10,067 ¶ 12.

> that origination and termination charges may be imposed under our transitional intercarrier compensation framework, including when an entity "uses Internet Protocol facilities to transmit such traffic to [or from] the called party's premises."[30]

This passage does not impose a requirement that the LEC or a VoIP partner needs to provide last mile facilities; rather, it merely addresses, as explained just a few paragraphs later in the Pai dissent, an issue the Commission had not yet decided: "whether a LEC could collect access charges when it transmitted a call using a format other than time-division multiplexing (such as IP)."[31] This reading is, if anything, even clearer when paragraph 969 is placed in context. In paragraph 968, which introduced the issues discussed in paragraphs 969 and 970, the Commission referred to pleadings identifying a number of disputes the Commission intended to resolve, including "disputes arising from [commenters'] use of IP technology as well as the structure of the relationship between retail VoIP service providers and their wholesale carrier partners."[32] The two following paragraphs then addressed those issues, one issue each: paragraph 969 clarified that the use of IP technology did not preclude the assessment of access charges and paragraph 970 addressed "the issue of whether particular functions are performed by the wholesale LEC or its retail partner," adopting the conclusion that the LEC could charge for functions performed by either.[33] Paragraph 969 thus says nothing about whether a LEC or a VoIP provider must provide last mile facilities or whether the customer may provide them for itself.

Third, the Pai dissent cites the Commission's decision in *Ymax*,[34] which predated the Commission's establishment of its VoIP-PSTN compensation framework in the *USF/ICC Transformation Order*. With respect to *Ymax*, the Pai dissent stated that "the Commission considered and rejected the contention that an over-the-top VoIP provider performs end office switching by interconnecting virtual loops over the Internet."[35] In fact, the Commission in *Ymax* held that Ymax was not entitled to assess end office switching charges because of how it had written its tariff and how that tariff applied to the specifics of Ymax's network configuration and the commercial relationships that Ymax had; it did not hold that LECs or over-the-top VoIP providers that partner with them do not perform the functional equivalent of end office switching as a matter of law.[36] "[W]e need not, and do not address issues regarding the intercarrier

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30 *See USF/ICC Transformation Order,* 26 FCC Rcd. ¶ 969.

31 *Pai VoIP Dissent*, 30 FCC Rcd. at 1617-18.

32 *USF/ICC Transformation Order*, 26 FCC Rcd ¶ 968.

33 On that issue, the Commission established the policy that the LEC could charge for functions performed by either. *See id*. ¶ 970.

34 *AT&T Corp. v. Ymax Communications Corp.*, Memorandum Op. and Order, 26 FCC Rcd. 5742 (2011) ("*YMax*").

35 *Pai VoIP Dissent*, 30 FCC Rcd. at 1616.

36 *CenturyLink Reply Comments* at 15-17; *see also Ymax*, 26 FCC Rcd. at 5748 ¶ 14 ("The fundamental problem appears to be that Ymax chose to model its Tariff on common language in LEC access

compensation obligations" of VoIP traffic, the Commission said, citing its pending *USF/ICC Transformation NPRM*, which had specifically sought comment on a framework that would apply to both nomadic and facilities-based VoIP.[37] "Moreover," the Commission went on, "we emphasize that this Order addresses only the particular language in Ymax's Tariff and the specific configuration of Ymax's network architecture."[38] "We express no view" the Commission further emphasized, "about whether or to what extent Ymax's functions, if accurately described in a tariff, would provide a lawful basis for any charges."[39] As CenturyLink has explained, *Ymax* was an order interpreting Ymax's tariff, a decision that expressly disclaimed answering any broader questions about what kinds of compensation might be available for VoIP traffic, then or in the future, whether in similar configurations or different configurations, and one which specifically referenced, without criticism, other LEC tariffs that appeared to encompass VoIP traffic using different terms.[40]

Verizon also relies on Commissioner O'Rielly's dissent, which asserted that "we know that the defining feature of end office switching is the actual connection of subscriber lines and trunks" and that, "while the functional equivalent concept provides some flexibility in determining how that key criterion is met, we also know that intermediate routing, such as merely placing calls onto the public Internet, does not count."[41]

The O'Rielly dissent did not cite any precedent for the claim that the defining feature of end office switching is the actual connection of subscriber lines and trunks, and, as CenturyLink has explained, precedents cited by others for that proposition, such as the *RAO 21 Reconsideration Order*, actually support CenturyLink's position.[42]

The O'Rielly dissent also asserted that in the *CLEC Access Reform Clarification Order*, the Commission determined that, according to the dissent, "carriers that merely pass calls to other carriers do not provide the functional equivalent of end office switching."[43] There,

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tariffs, even though the functions Ymax performs are very different from the access services typically provided by LECs.")

37 *Ymax*, 26 FCC Rcd. at 5743 ¶ 1 n. 7 (*citing Connect America Fund*, Notice of Proposed Rulemaking and Further Notice of Proposed Rulemaking, 26 FCC Rcd. 4554, 4744-4745 ¶ 608 (2011) ("*USF/ICC Transformation NPRM*")); *see also USF/ICC Transformation NPRM* at 4747 ¶ 612 (seeking comment on whether a different intercarrier compensation framework should apply to nomadic and fixed interconnected VoIP).

38 *Ymax*, 26 FCC Rcd. at 5743 ¶ 1 n.7.

39 *Id.* at 5748 ¶ 14 n.55.

40 *See CenturyLink Reply Comments* at 16.

41 *VoIP Symmetry Declaratory Ruling*, 30 FCC Rcd. at 1620, Dissenting Statement of Commissioner Michael O'Rielly ("*O'Rielly VoIP Dissent*").

42 *See supra* pp. 5-6.

43 See *O'Rielly VoIP Dissent*, 30 FCC Rcd. at 1620 (*citing Access Charge Reform*, Eighth Report and Order and Fifth Order on Reconsideration, 19 FCC Rcd. 9108 (2004) ("*CLEC Access Reform Clarification Order*")).

however, the Commission's focus was on whether the LEC was charging for providing access to its own end user as opposed to the end user of another carrier.[44] Nothing in that order addressed the question of whether a LEC's ability to assess end office access charges depended on *how* the LEC's end user might connect to the LEC—whether over TDM facilities, IP facilities, or customer-supplied bandwidth, whether Internet service or otherwise. Indeed, as discussed above, the Commission's decision in *Ymax*, which the O'Rielly dissent cited as "another link in the chain," made clear that the Commission had not previously addressed the intercarrier compensation obligations that would apply to interconnected VoIP, noting that those issues were raised in the pending notice of proposed rulemaking, and explicitly stated that the Commission was not, even almost a decade after the *CLEC Access Reform Clarification Order*, deciding the issue.

2. The *Transformation Order* Does Not Support Verizon's Interpretation of the VoIP Symmetry Rule.

Verizon's assertion that the VoIP Symmetry Rule was intended solely "to resolve disputes that arose when *fixed* VoIP retail providers, like cable companies, partnered with wholesale carrier LECs"[45] relies on a single paragraph from the *USF/ICC Transformation Order*, paragraph 968.[46] But Verizon misreads paragraph 968 to say something neither it nor any other part of the order did. To the contrary, the Commission stated in paragraph 968, "we believe a symmetric approach to VoIP-PSTN intercarrier compensation is warranted for all LECs," and it did not limit its statement to LECs with last mile facilities.[47] The Commission expressly sought to adopt rules to simplify structures and reduce litigation and disputes, not to multiply them.[48] If there were any doubt on this point, a more complete examination of the *USF/ICC Transformation Order* and the notice of proposed rulemaking that led to it confirms that Verizon is incorrect about the purpose and scope of what the Commission actually did.

In the *USF/ICC Transformation NPRM*, the Commission noted that "disputes increasingly have arisen among carriers and VoIP providers regarding intercarrier compensation for VoIP traffic" and cited a wide range of submissions and proceedings, spanning many years, to illustrate the breadth of disputes surrounding the issue.[49] The Commission also highlighted that there was evidence "of asymmetrical revenue flows for traffic exchange between a traditional wireline LEC and a VoIP provider, with the VoIP provider (or its LEC partner)

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[44] *See CLEC Access Reform Clarification Order*, 19 FCC Rcd. at 9112 ¶ 9.

[45] *Verizon Dec. 19, 2019 ex parte* at 2; *see also Verizon Feb 7, 2019 ex parte* at 3.

[46] Verizon also cites paragraph 736 of the *Transformation Order* in footnote 6 of its discussion, *see Verizon Dec. 19, 2019 ex parte* at 2 n.6, but that citation appears to have been a mistake, as nothing in paragraph 736 of the *Transformation Order* discusses the Commission's VoIP policies. *See USF/ICC Transformation Order,* 26 FCC Rcd. ¶ 736.

[47] *Id.* ¶ 968.

[48] *Id*. ("recognizing that these specific questions have given rise to disputes, we believe that addressing this issue under our transitional intercarrier compensation framework will reduce uncertainty and litigation, freeing up resources for investment and innovation").

[49] *USF/ICC Transformation NPRM*, 26 FCC Rcd. at 4746 ¶ 610 & nn. 913-920.

collecting access charges, for example, but refusing to pay them."[50] Many of these disputes, at their core, were simply about whether and how the existing intercarrier compensation regime applied to IP traffic (or, put another way, whether and how the so-called ESP exemption applied).[51] To address these issues, the Commission proposed adopting rules that would "focus specifically on the intercarrier compensation rules governing interconnected VoIP traffic" but asked whether that might be too narrow a focus and whether it should also consider obligations for other forms of VoIP.[52] Contrary to Verizon's claim that the Commission was focused only on fixed VoIP, the Commission also specifically sought "comment on whether the Commission should distinguish between facilities-based 'fixed' and 'nomadic' interconnected VoIP."[53]

When it adopted its framework for VoIP-PSTN traffic in the *USF/ICC Transformation Order*, the Commission first repeated its observation that "the lack of clarity regarding the intercarrier compensation obligations for VoIP traffic ha[d] led to significant billing disputes and litigation."[54] The Commission cited its discussion from the NPRM about the need for clarity in light of increasing disputes as well as a host of disputes before state commissions, courts, and the Commission.[55] And the Commission once again observed the existence of disputes reflecting "asymmetries" in payments, where some carriers would charge "full access charges" for VoIP traffic but refuse to pay any access charges in connection with VoIP traffic.[56] The Commission's framework was intended to sweep broadly and address all of those disputes on a going-forward basis. Far from establishing different rules for fixed and nomadic interconnected VoIP—as contemplated in the NPRM,[57] and as AT&T had urged it to do[58]—the Commission explained that it had decided it would not limit its framework to interconnected VoIP at all; instead, it would apply even more broadly, to *all* VoIP-PSTN traffic.[59] Notably in this regard, AT&T had asserted that permitting CLECs to collect the full benchmark rate for over-the-top calls—and here AT&T specifically referenced calls involving Vonage and Skype—would amount to

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50 *Id.* ¶ 610.

51 *See USF/ICC Transformation Order*, 26 FCC Rcd. ¶ 945; *see also Pai VoIP Dissent*, 30 FCC Rcd. at 1617-18 (noting that whether a LEC could collect access charges when it transmitted a call in a format such as IP was one of the key issues resolved when the Commission adopted its VoIP-PSTN intercarrier compensation framework).

52 *USF/ICC Transformation NPRM*, 26 FCC Rcd. at 4747 ¶ 612.

53 *See id*.

54 *USF/ICC Transformation Order*, 26 FCC Rcd. ¶ 937.

55 *See id*.

56 *Id*. ¶ 938; s*ee also USF/ICC Transformation NPRM*, 26 FCC Rcd. at 4746 ¶ 610.

57 *See Id.* 4747 ¶ 612.

58 *See* Letter from Robert W. Quinn, Jr., AT&T, to Marlene H. Dortch, FCC, WC Docket No. 10-90, et al., at 6 n.24 ("*AT&T Quinn Letter*"), attached to Letter from Jack Zinman, AT&T, to Marlene H. Dortch, FCC, WC Docket No. 10-90, et al. (filed Oct. 21, 2011) ("full benchmark switched access charges [should be limited] to only those situations where the CLEC delivers the call directly to an affiliated, facilities-based voice provider").

59 *See USF/ICC Transformation Order*, 26 FCC Rcd. ¶ 941.

imposing access charges on the Internet,[60] but the Commission rejected that argument out of hand, not because it adopted a different compensation framework for nomadic traffic as AT&T had proposed, but because allowing CLECs to charge the full benchmark rate when partnering with retail VoIP providers like those AT&T had identified did not, in fact, have anything to do with "broadly imposing access charges on the Internet."[61] The Commission also repeatedly described its framework as "symmetrical," rejecting the various "asymmetric" possibilities it enumerated—so many times, in fact, that the VoIP-PSTN framework the Commission adopted became known as the VoIP Symmetry Rule.

In this context, it is implausible that the Commission, without ever saying so, created a framework that (i) resulted in different compensation for fixed and nomadic VoIP or (ii) was asymmetric in providing greater compensation for traditional LECs than for some VoIP providers when their switches were performing the same functions. It is also implausible that the Commission, contrary to its express intent to establish a clear compensation framework that would avoid future disputes and litigation, would have established a framework that leads to the sort of bizarre outcomes discussed above and which no carrier, including the carriers that argue for it, appear to follow.

3. CenturyLink's Position Is Supported by a Straightforward Application of the Law.

As CenturyLink has explained,[62] and as Verizon concedes, it has always been the case that when a LEC delivered a long-distance call to (or received a long-distance call from) its end user enterprise customer's PBX, the LEC was entitled to charge end office access charges, regardless of whether the called (or calling) individual was physically located at the same building as the PBX or was in a remote location connected to the PBX. That was true regardless of whether the enterprise deployed an internal network obtained from the LEC or from any other vendor, or what kind of network the enterprise used.

The reason that the company's choice of how to connect its remote employees to the PBX was immaterial was because LEC tariffs provided that the LEC imposed switched access charges for delivering calls to the LEC's "end users" (or delivering calls from the end user to the IXC),[63] and the "end user" in any call was the enterprise itself, *not* the individual employee

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60 *See AT&T Quinn Letter* at 5.

61 *See USF/ICC Transformation Order*, 26 FCC Rcd. ¶ 970 n.2025.

62 *CenturyLink Nov. 28, 2018 ex parte* at 1-2, 5.

63 Verizon, AT&T, and CenturyLink's incumbent LEC tariffs are, and have been, virtually identical on this point. *See* Verizon Tel. Cos. Tariff FCC No. 1 § 6.1, at 6-1 (stating that Switched Access Service provides a "communications path to a customer's facilities from an end user's premises," and it provides "for the ability to originate calls from an end user's premises to a customer's facilities" as well as to "terminate calls from a customer's facilities to an end user's premises in the LATA where it is provided"); Southwestern Bell Tel. Co. Tariff FCC No. 73 § 6.1 at 6-6 (stating that "Switched Access Service provides a two-point communications path between a customer's premises and an end user's premises" and it "provides for the ability to originate calls from an end user's premises to a customer's premises, and to terminate calls from a customer's premises to an end user's premises"); CenturyLink Operating Cos. Tariff FCC No. 1 § 6.1 at 6-1 (stating that Switched Access Service

placing or receiving call.[64] When the LEC delivered the call to wherever the enterprise asked it to deliver the call to—the PBX—the LEC's task was done, and it was entitled to assess access charges.

Moreover, as CenturyLink has also explained, there is no basis for distinguishing between calls involving an enterprise's remote employees from calls involving customers that, rather than connecting remote employees, connect remote customers of their own.[65] That is because in such a call, the VoIP provider is the LEC's end user under the traditional incumbent LEC tariff definition, assuming the VoIP provider has purchased appropriate services from the LEC.[66] Indeed, as CenturyLink has previously explained, it, as an incumbent LEC, has had PRI customers that enabled over-the-top VoIP service for their own customers. A straightforward application of the CenturyLink tariff confirms that those customers—the VoIP providers—were "end users" and that CenturyLink was entitled to collect end office access charges for calls delivered to or received from them.[67] If "functional equivalence" means anything, it must mean that a CLEC delivering calls over a SIP trunk can charge access charges in the same circumstances where an incumbent LEC delivering calls over a PRI could, and LECs can accordingly charge end office access charges when partnering with VoIP providers, at least when they offer service utilizing such configurations.

"provides a two-point communications path between a customer designated premises and an end user's premises" and that it "provides for the ability to originate calls from an end user's premises to a customer designated premises, and to terminate calls from a customer designated premises to an end user's premises").

64 *See* Verizon Tariff FCC No. 1 §2.6 at 2-64 ("The term 'End User' denotes any customer of an interstate or foreign telecommunications service that is not a carrier, except that a carrier other than a telephone company shall be deemed to be an 'end user' when such carrier uses a telecommunications service for administrative purposes and a person or entity that offers telecommunications services exclusively as a reseller shall be deemed to be an 'end user' if all resale transmission offered by such reseller originate on the premises of such reseller"); Southwestern Bell Tel. Co. Tariff FCC No. 73 § 2.7, at 2-103 (The term End User "[d]enotes any customer of an interstate or foreign telecommunications service that is not a carrier, except that a carrier other than a Telephone Company shall be deemed to be an 'end user' when such carrier uses a telecommunications service for administrative purposes and a person or entity that offers telecommunications services exclusively as a reseller shall be deemed to be an 'end user' if all resale transmissions offered by such reseller originate on the premises of such reseller."); CenturyLink Operating Cos. Tariff FCC No. 1 § 2.6 at 2-66 ("The term 'End User means any customer of an interstate or foreign telecommunications service that is not a carrier, except that a carrier other than a telephone company shall be deemed to be an 'end user' when such carrier uses a telecommunications service for administrative purposes, and a person or entity that offers telecommunications service exclusively as a reseller shall be deemed to be an 'end user' if all resale transmissions offered by such reseller originate on the premises of such reseller.")

65 *See CenturyLink Nov. 28, 2018 ex parte* at 6-8.

66 *See* supra n. 64 (citing the definition of "end user" in CenturyLink, AT&T, and Verizon incumbent LEC tariffs). Any non-carrier VoIP provider that had purchased interstate telecommunications services from the incumbent LEC would qualify as an end user.

67 *See id.*

To be sure, the Commission could consider changing the law in this regard to provide that CenturyLink and other incumbent LECs, as well as competitive LECs, could not define "end user" in their tariffs the way they have for these many years, consistent with the Commission's own definition in section 69.2 of its rules.[68] If it did, it would be required to do so in a notice-and-comment rulemaking, subject to the usual requirements under the Administrative Procedure Act. But to declare now that virtually all incumbent LEC tariffs, filed consistent with every rule applicable at the time and deemed lawful many years ago, did not in fact permit those carriers to impose end office access charges in such situations would be reversible error.

Verizon argues that the LEC cannot be performing the functional equivalent of end office switching in these arrangements because the "reason for the VoIP symmetry rule [is] to allow a LEC to charge for work *it is not performing* but is performed instead by its VoIP partner. If the *LEC* were already performing the functional equivalent of end office switching *on its own* when handling third-party VoIP calls, there would have been no need for the VoIP symmetry rule."[69] As discussed above, Verizon is incorrect about the purpose and scope of what the Commission did in adopting the VoIP Symmetry Rule. Moreover, Verizon's argument fails even on its own terms. For one thing, even though the arrangements discussed above, in which the VoIP provider obtains a relevant service from the LEC and is therefore an end user, might be common, the rule adopted by the Commission would permit the LEC to assess end office access charges in any number of other situations as well, such as arrangements where the VoIP provider does not purchase services from the LEC. For another, Verizon's argument proves too much: if Verizon were right that the mere existence of the VoIP symmetry rule means that the LEC could not be performing the functional equivalent of end office switching, then that also means that end office access charges could *never* have been appropriate for VoIP traffic involving a separate corporate entity VoIP provider—even if that entity was affiliated with a LEC—prior to the *USF/ICC Transformation Order*. The Commission was quite clear in that order, however, that it was not deciding anything with respect to the prior state of the law.[70] The point of this part of the VoIP symmetry rule was not to take a position one way or the other regarding what functions any entity performed or needed to perform, but was rather to say that, on a going-forward basis, it *did not matter*.

For this reason, even if, contrary to their plain terms, incumbent LEC tariffs did not consider VoIP providers to be end users, such that the customer of the VoIP provider was the end user, or even if the Commission could declare that such tariffs were unlawful retrospectively consistent with the filed rate doctrine, end office access charges would still be applicable on over-the-top calls involving such end users. That is because, as CenturyLink has shown, LECs and their VoIP partners perform the functional equivalent of end office switching,[71] and none of the arguments to the contrary by AT&T or Verizon in this proceeding withstands scrutiny.

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[68] *See* 47 C.F.R. § 69.2.

[69] *Verizon Feb. 7, 2019 ex parte* at 3 (emphasis in original).

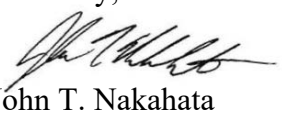
[70] *See USF/ICC Transformation Order*, 26 FCC Rcd. ¶ 945 ("Our intercarrier compensation framework for VoIP-PSTN traffic will apply prospectively. . . . We do not address preexisting law").

[71] *See* Petition of CenturyLink for a Declaratory Ruling at 8-14, Declaration of Adam Uzelac (filed May 11, 2018).

In this regard, too, the Commission could consider changing the law through notice-and-comment rulemaking to establish the "bright line" rule that Verizon proposes, subject again to the requirements of the Administrative Procedure Act. Here again, however, to declare that such a bright line rule was always the law, notwithstanding its inconsistency with precedent and apparently unanimous industry practice—including by the carriers arguing for the bright line rule—would be reversible error.

Please contact me if you have any questions regarding this matter.

Sincerely,



John T. Nakahata
Kristine Laudadio Devine
HARRIS, WILTSHIRE & GRANNIS LLP
1919 M Street, NW
The Eighth Floor
Washington, DC 20036
(202) 730-1300
jnakahata@hwglaw.com

cc:

Aaron Garza
Victoria Goldberg
Lisa Hone
Rhonda Lien
Gil Strobel